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IN THE

Supreme Court of the United States

October Term, 1949

No. 284

LOUIS BERNARD LAPIDES,

Petitioner,

vs.

TOM C. CLARK, Attorney General, and WATSON B. MILLER, Commissioner of the Immigration and Naturalization Service,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE AS AMICUS CURIAE

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INDEX

PAGE

Interest of the American Jewish Committee as Amicus Curiae 1

Opinions Below 3

Jurisdiction 4

Questions Presented 4

Constitutional and Statutory Provisions Involved 4

Statement 6

Summary of Argument 7

Argument: I 9

II 12

1. The Deprivation Resulting From the New Rule 14

2. Conditions Existing Prior to the Legislation 14

a. Legislative History 15

3. The Possibility of Achieving the Same Benefits at a Lower Price 22

Conclusion 28

CITATIONS

Cases:	PAGE
Baumgartner v. United States, 322 U. S. 665	10, 27
Camardo v. Tillinghast, 29 F. (2d) 527	16
Cantwell v. Connecticut, 310 U. S. 296	25
Carlson v. California, 310 U. S. 106	25
DeJonge v. Oregon, 299 U. S. 353	25
Detroit Bank v. United States, 317 U. S. 329	12
Ex Parte Kumezo Kawato, 317 U. S. 69	2
Glasser v. United States, 315 U. S. 60	13
Goesaert v. Cleary, 335 U. S. 464	11
Heiner v. Donnan, 285 U. S. 312	24
Hirabayashi v. United States, 320 U. S. 81	12, 13, 21
Klapprott v. United States, 335 U. S. 601	14, 27
Knauer v. United States, 328 U. S. 654	27
Lovell v. Griffin, 303 U. S. 444	25
Luria v. United States, 231 U. S. 9	10
Mackenzie v. Hare, 239 U. S. 299	11, 23
Ng Fung Ho v. White, 259 U. S. 276	14
Nurge v. Miller, 286 Fed. 982	16
Osborn v. United States Bank, 9 Wheat. (22 U. S.) 738	10
Oyama v. California, 332 U. S. 633	24

PAGE

Perkins v. Elg, 307 U. S. 325 23

Schlesinger v. Wisconsin, 270 U. S. 230 24
Schneider v. State, 308 U. S. 147 ..... 14, 25
Schneiderman v. United States, 320 U. S. 118 ..... 14, 27
Smith v. Texas, 311 U. S. 128 13
Steward Machine Co. v. Davis, 301 U. S. 548 12

Thomas v. Collins, 323 U. S. 516 25

United States ex rel. Lapides v. Watkins, 165 F. 2d 1017 6
United States v. Gay, 264 U. S. 353 16
United States v. Schwimmer, 279 U. S. 644 11
United States v. Wong Kim Ark, 169 U. S. 649 11

Constitution:

Article I:
Section 8 ..... 4, 10
Article II:
Section 1 4
Fifth Amendment 4
Fourteenth Amendment 5

Statutes:

Act of March 2, 1907, 34 Stat. 1228 ..... 15, 26
Nationality Act of 1940, Sections 404(a)(b)(c) and 503 ..... 2, 3, 5, 7, 9, 15
8 U. S. C., Sections 805, 806, 903 ..... 3, 26

Miscellaneous:

PAGE

American Civil Liberties Union, Amicus Curiae brief in *Lapides* v. *Clark*, United States Court of Appeals for the District of Columbia 11

Borchard, Diplomatic Protection of Citizens Abroad (1915) 26

Black, *Disloyalty and Denaturalization*, 29 Ky. L. J. 143 (1941) 27

Hearings before Committee on Immigration and Naturalization on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st Sess., p. 691 (1940) 14, 16-20, 23

Hover, *Citizenship of Women in the United States*, 26 Am. J. Int. Law 700 (1932) 11

Involuntary Loss of Citizenship, Report of the Special Committee on Expatriation of the National Council on Naturalization and Citizenship, March 1947 23

Koessler, *"Subject", "Citizen", "National", and "Permanent Allegiance"*, 56 Yale L. J. 58 (1946) 2

Note, 52 Yale L. J. 1215 (1942) 27

28 Op. cit. Att'y. Gen. 504 16

Testimony of Emma Wold on the effect of marriage on nationality before the Committee on Immigration and Naturalization, 70th Cong., 1st Sess. (1928) 11

The Consideration of Facts in "Due Process" Cases, 30 Col. L. Rev. 360 (1930) 13

Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949) 13

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BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE AS AMICUS CURIAE

Interest of the American Jewish Committee

This brief is filed, with the consent of both parties, on behalf of the American Jewish Committee, which was established in 1906 to prevent the infraction of the civil and religious rights of Jews. The American Jewish Committee has been closely concerned with questions of immigration and naturalization for the forty-three years of its existence.

It is our fundamental belief that the status of the naturalized citizen is not a matter of interest solely to him. Any act which places in jeopardy the equal status of the naturalized citizen undermines the foundation of rights guaranteed to all citizens in our democracy. The history of our nation is replete with instances which give testimony to the fact that the treatment accorded the naturalized citizen is in a large measure indicative of our democratic health.

It is our contention that Section 404 (c) of the Nationality Act of 1940 is unconstitutional, for it disturbs established rights and arbitrarily discriminates between native born and naturalized citizens in such a manner as to create for naturalized citizens a second class citizenship not wholly dissimilar to that created by Hitler's Nuremberg Laws.

Under those laws, gradations of citizens were established. Those who possessed superior racial qualities were in the privileged status of Reichsbürger, or Citizen of the Reich. Others were merely Staatsangehörigen, or mere nationals of the Reich. See Koessler, *"Subject", "Citizen", "National", and "Permanent Allegiance"*, 56 YALE L. J. 58 (1946). These laws substantially duplicated the Sixteenth century Spanish enactments instigated by the Inquisition, which made the possession of Christian blood a requirement for the status of *civis pleni juris*, or full citizenship.

In sharp contrast, ours is a nation in which traditionally all citizens have been treated equally. The naturalized citizen forms a large part of our total citizenry. Indeed, as this Court has pointed out, ours is "a country whose life blood came from an immigrant stream." We have been built by the contributions "made in peace and war by the millions of immigrants who have learned to love the country of their adoption more than the country of their birth." *Ex parte Kumezo Kawato*, 317 U. S. 69, 73.

If Congress is here permitted to discriminate against the naturalized citizen, his security will fluctuate with the political temper of majority thought. During periods of tenseness and unrest, distrust of the naturalized citizen has led to attempted abridgement of his freedom. Our experiences with two world wars has, however, demonstrated that the alarm which motivates such harsh measures as this one has been totally unwarranted.

The real threat to our democratic institutions comes not from the direction of our naturalized citizen, but rather from ill-advised discriminatory measures such as the one contested here.

Opinions Below

The majority and dissenting opinions in the Court of Appeals have not yet been reported. The majority opinion justified the discrimination against naturalized citizens in Sec. 404(c) of the Nationality Act of 1940 on the basis that national policy considerations were paramount and that it was necessary to "lessen friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens * * *." The Court concluded that, since this Court has permitted a classification between native citizens because of sex, the present discriminatory classification separating native-born and naturalized citizens was not arbitrary. The dissenting judge stated that in his opinion Sec. 404(c) is unconstitutional because it embodies a discrimination against naturalized citizens and also because it arbitrarily expatriated the present petitioner.

Jurisdiction

The judgment of the Court of Appeals was entered May 23, 1949. The petition for a writ of certiorari was filed August 22, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the Constitution forbids any distinction whatsoever between naturalized and native-born citizens, with regard to a provision for the expatriation of naturalized citizens as the result of specified residence abroad subsequent to naturalization.

2. Whether Sec. 404(c) of the Nationality Act of 1940 establishes an unreasonable and arbitrary classification against naturalized citizens under the due process clause of the Fifth Amendment.

Constitutional and Statutory Provisions Involved

The following Constitutional provisions are relevant:

Article I, Section 8:

> The Congress shall have Power * * * To establish a uniform Rule of Naturalization * * *.

Article II, Section 1:

> No Person except a natural born Citizen * * * shall be eligible to the Office of President.

Fifth Amendment:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

The following statutory provisions are also relevant. Section 404 of the Nationality Act of 1940, 8 U. S. C. 804, Section (c) of which is directly challenged in this litigation, provides that:

> A person who has become a national by naturalization shall lose his nationality by:
>
> (a) Residing for at least two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign state by operation of the law thereof; or
>
> (b) Residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 406 hereof;
>
> (c) Residing continuously for five years in any other foreign state, except as provided in section 406 hereof.

Exceptions to Section 404 are provided for in Sections 405 and 406, 8 U. S. C. 805 and 806, which are quoted at pages 3-5 of the petition. The petitioner concededly did not qualify under any of these exemptions.

Statement

The petitioner, who has lived in the United States for twelve years, was born in Austria. He entered the United States in 1922 and was naturalized as a citizen on June 27, 1928. The petitioner continued to reside in the United States until 1934, when he left this country for Palestine. During his absence, six years after his departure, and about twelve years after he had become a citizen of the United States, Congress enacted the Nationality Act of 1940, Sec. 404(c) of which provided that a naturalized citizen shall be deprived of his citizenship if he resides continuously for five years in any foreign state other than his country of origin.

The petitioner remained in Palestine until July, 1947. He arrived in the United States on July 3, 1947, at which time he presented his uncancelled certificate of naturalization and sought admission. But on July 8, 1947, he was excluded from this country on the ground that he had lost his American citizenship by virtue of his residence in Palestine for more than five years.

The petitioner's appeals to the Commissioner of the Immigration and Naturalization Service and to the Board of Immigration Appeals were unsuccessful; on August 5, 1947 the order of exclusion was affirmed by the Board of Immigration Appeals acting for the Attorney-General. The petitioner then brought a habeas corpus action in the District Court for the Southern District of New York in which he challenged the legality of his detention and exclusion and contended that he was entitled to enter the United States as a citizen. The writ of habeas corpus was dismissed and the order of dismissal affirmed by the Court of Appeals for the second circuit. *United States ex rel. Lapides* v. *Watkins,* 165 F. 2d 1017 (C. C. A. 2).

The petitioner then brought this action in the District Court of the District of Columbia in which he seeks

a declaratory judgment under Section 503 of the Nationality Act, 8 U. S. C. 903, that he is a citizen of the United States. The petitioner in this proceeding contends that Sec. 404(c) is unconstitutional. A motion to dismiss the complaint was granted in the District Court, and the Court of Appeals for the District of Columbia, one judge dissenting, affirmed the dismissal of the complaint.

The present petition is for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit from the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The following arguments will be urged in this brief:

I. In many early as well as recent cases this Court has reaffirmed the principle that the Constitution does not provide for any distinction between native-born and naturalized citizens. A study of the historical background of the Constitution, together with an analysis of the English common law, the common law of the several states, and statements made at the time of the adoption of the Constitution buttress this accepted view.

II. Even if it were agreed *arguendo* that a classification between native-born and naturalized citizens is permitted by the Constitution, nevertheless this particular classification is an unreasonable and arbitrary one, and therefore violative of the due process clause of the Fifth Amendment. There are at least three bases on which this class legislation should be analyzed:

A. The Deprivation Involved

The deprivation of citizenship is an exceedingly severe one. This Court has revealed in recent times a growing appreciation of the significance of the right of citizenship,

and of the many crucial civil and political rights dependent upon it, and considers the loss of citizenship a harsh penalty.

B. The Showing of Need

Particularly where legislation is restrictive of fundamental civil liberties, this Court has suspended the normal presumption of constitutionality and has examined closely into the character of legislative preferences or beliefs. An affirmative showing of need for restrictive legislation has been required. Despite claims here of "urgent need", such a showing has not been made in this case. On the contrary, the history of this legislation plainly reveals that it was originally rejected by the body of law makers charged with codifying our nationality laws, because there was no need for it. The section in question was actually enacted at the last minute for the flimsiest of reasons.

C. The Requirement That the Legislation Be Narrowly Drawn to Curb the Specific Abuse

Where legislation impinging on civil rights is considered necessary, this Court has insisted that it be narrowly drawn to curb the specific evil which causes concern. Sweeping legislation which unnecessarily deprives citizens of their civil and political rights has been struck down repeatedly by this Court.

This legislation is too broadly drafted. It strips persons of their precious citizenship, whether or not they are the cause of friction, embarrassment or trouble; whether or not they are loyal to the United States, whether or not their prolonged residence abroad is voluntary, and regardless of their intent to maintain their citizenship. Residence abroad, without more, is the cause for automatic termination of citizenship. With the exception of certain nominal exemptions, individual circumstances are

not considered. Such legislative fiat is the essence of denial of due process of law.

The arbitrary character of this legislation should be contrasted with previous legislative enactments which have provided ample protection of citizenship rights while at the same time also protecting the interests of this country. The refusal, in this legislation, to consider individual cases on the basis that to do so would create administrative burdens is particularly unwarranted where the legislative history reveals that the number of citizens directly affected by this legislation is small. Even should the provisions of previous legislation not be considered practicable to deal with this problem, at the very least, proceedings for expatriation should be provided which are surrounded by constitutional securities to insure a most thorough examination into intent to expatriate oneself, and the voluntary nature of residence abroad.

Argument

I

The issue before this Court is whether it will grant certiorari in order to determine the validity of Section 404(c) of the Nationality Act of 1940, which provides that a naturalized American citizen shall be deprived of his citizenship if he resides continuously for five years in any foreign state.[1] The section does not apply to native-born American citizens, who suffer no comparable deprivation due to residence abroad, no matter how prolonged.

It is our contention that Section 404(c) of the Nationality Act of 1940 is unconstitutional since it establishes a discriminatory and arbitrary classification by which the

[1] Exemptions from Section 404(c), provided in Sections 405 and 406, 8 U. S. C. 805 and 806, are listed at pages 3-5 of the petition.

naturalized citizen is differentiated from the native-born citizen, singled out and denied his citizenship, together with its rights and privileges, if he exercises an otherwise unmolested right to reside abroad as he wishes. Such a severe deprivation resulting from an arbitrary discrimination is antipathetic to the American concept of due process of law. The heavy penalty is levied against all naturalized citizens regardless of their devotion to America and their connections here, whereas all native-born American citizens, also regardless of possible devotion to a foreign country and connections there, suffer no such penalty.

It is the purpose of this brief to discuss principally the question of the reasonableness of the classification established by Section 404(c). Since the other question presented—viz.: whether any distinction between natural-born and naturalized citizens is constitutional, appears to us to be fully discussed in the other briefs before this Court, our discussion on that point will be especially limited.

While it may be argued that the Constitution empowers Congress to "establish a uniform rule of naturalization" Article I, Section 8, Par. 4, into which may be read the implied power to stipulate acts of expatriation, it does not follow that in determining the character of citizenship rights Congress may discriminate among American citizens solely because of race, religion or—as in this case—national origin. As early as 1824, in *Osborn* v. *United States Bank,* 9 Wheat. (22 U. S.) 738, 827, Chief Justice Marshall, speaking for this Court, pointed out that the naturalized citizen "* * * becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native." And, as late as 1944, in *Baumgartner* v. *United States,* 322 U. S. 665, 673, Justice Frankfurter, quoting from *Luria* v. *United States,* 231 U. S. 9, 24, de-

clared that " 'Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects save that of eligibility to the Presidency.' " See also *United States* v. *Wong Kim Ark,* 169 U. S. 649, 702-3 and *United States* v. *Schwimmer,* 279 U. S. 644, 649.

The granting of certiorari in this case is of particular importance because this Court is now being asked by the Government to sanction a deviation from that fundamental principle, something the Court has not done before in cases involving citizenship.

In the only case in which this Court previously upheld an expatriation statute, there was permitted a distinction between citizens on the basis of sex, but not on the basis of national origin. At that time, the distinction because of sex was a realistic one founded on the then current concept of the unity of husband and wife and on the acceptance by the wife of her husband's allegiance. This Court pointed out then that "The identity of husband and wife is an ancient principle of our jurisprudence * * * It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy." *Mackenzie* v. *Hare,* 239 U. S. 299, 311. Even now, statutes which discriminate against women as a class are not considered unreasonable. *Goesaert* v. *Cleary,* 335 U. S. 464. See Hover, *Citizenship of Women in the United States,* 26 Am. J. Int. Law 700 (1932) and Testimony of Emma Wold on the effect of marriage on nationality before the Committee on Immigration and Naturalization. 70th Cong., 1st Sess. (1928).

The broad question of the status of the naturalized vis-a-vis the native born citizen has been treated with extensively in an *amicus curiae* brief filed on behalf of the American Civil Liberties Union in this case in the Court of Appeals. That brief presents a historical background of the Constitutional provisions affecting the status of naturalized citizens, penetrates beyond the provisions themselves to a consideration of English common law and

the common law of the states, and considers them in light of statements contemporary with the adoption of the Constitution and with the Convention proceedings and the Constitution as a whole. The conclusion is reached that the Constitution bars any departure from the principle of equality of naturalized and native-born citizens.

II

As has been pointed out, even if it could be assumed *arguendo* that a classification between "native-born" and "naturalized" citizens were permitted, it is our conviction that the particular classification embodied in Section 404 (c) is arbitrary, unreasonable, and therefore a violation of the due process clause of the Fifth Amendment.

The Government seeks to justify the classification upon which this discrimination rests by referring to it as "entirely fair" and "reasonably devised" (Br. 14). *Detroit Bank* v. *United States,* 317 U. S. 329, 337, and *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584, are invoked to support the proposition that Congressional enactments "generally" are not subject to attack on the ground of unfair classification.

Not that the Government does not admit (Br. 14) that there are limits to the authority to define conduct which may cause loss of citizenship, and that the arbitrary federal deprivation of a citizen's rights is subject to attack under the Fifth Amendment as a denial of due process.[2] Even the *Steward* case, usually cited to uphold a classification, reminds us that a classification is arbitrary where

[2] It is not necessary for our purpose, as the Government claims, to contend that the Fifth Amendment contains a guarantee of "equal protection of the laws." The prohibition of the Fifth Amendment against arbitrary classification on the basis of race, religion or national origin embodies the same reasoning and the same policies as does the Fourteenth Amendment. As Justice Murphy has pointed out in *Hirabayashi* v. *U. S.,* 320 U. S. 81, 112, if persons of a particular race were systematically excluded from a jury in a Federal court, a conviction obtained on that basis undoubtedly would be

it has no reasonable relation to legitimate legislative ends and is not "supported by considerations of policy and practical convenience." At 584.

This Court, which has struck down many forms of state discrimination by classification, has never exempted the Federal Government from the bar against arbitrary classifications among citizens, especially when the classifications are based on race, religion or national origin. As this Court has stated in *Hirabayashi* v. *United States*, 320 U. S. 81, 100:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

It is obvious that the reasonableness of legislation which enacts a classification discriminatory against one group of citizens can be determined, not by invoking a few scattered precedents, but rather by close analysis.

Three criteria usually considered when the "reasonableness" of a classification is judged are (1) the deprivation resulting from the new rule; (2) the conditions existing prior to the legislation; and (3) the possibility of achieving the same benefits at a lower price.[3] Upon analysis based on these criteria, the bankruptcy of Section 404 (c) becomes readily apparent.

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thought to violate the requirement of due process of law of the Fifth Amendment. The comparable ground commonly used in the state courts for setting aside such a conviction would be the denial of "equal protection of the laws." Compare *Glasser* v. *U. S.*, 315 U. S. 60 with *Smith* v. *Texas*, 311 U. S. 128. In invoking the numerous injunctions by this court against racial, religious or national origin discrimination, it does not seem necessary to strain the concept of due process of law, for "equal protection of the laws" on a state level is the same as due process of the law on a federal level. For a germane discussion of the "equal protection of the laws" concept in relation to due process, see the recent article by Tussman and tenBroek, *The Equal Protection of The Laws*, 37 CAL. L. REV. 341, especially at 361-5 (1949).

[3] See *The Consideration of Facts in "Due Process" Cases*, 30 COL L. REV. 360 (1930), from which these are drawn. A fourth, the effectiveness of the new rule to improve conditions, will not be discussed here since only speculation would result.

1. The Deprivation Resulting From the New Rule

There should be no question as to the importance of the rights abridged, and the extent of the deprivation involved. Citizenship has been referred to by this Court as a right "no less precious than life or liberty, indeed one which today comprehends those rights and almost all others." *Klapprott* v. *United States,* 335 U. S. 601, 616. It has, at other times, been spoken of by this Court, as "precious", *Schneiderman* v. *United States,* 320 U. S. 118, 122; "the highest hope of civilized men" *Id.,* and as "all that makes life worth living" *Ng Fung Ho* v. *White,* 259 U. S. 276, 284. It is a right from which flow other fundamental rights. Deprivation of American citizenship has been regarded by this Court as an extraordinarily severe penalty, the consequences of which are often more serious even than consequences flowing from criminal convictions. *Klapprott* v. *United States, supra.*

Even the State Department representative who pressed for passage of Section 404(c) when the Nationality Act of 1940 was in committee, admitted that the penalty was "severe". See Mr. Richard Flournoy's statement, *infra,* page 18.

2. Conditions Existing Prior to the Legislation

In the face of such a harsh penalty, we ask: What was the need? In many decisions this Court has affirmed that especial attention must be given to the basis for legislation which restricts fundamental liberties. This Court has demanded a positive showing for the need of such a measure, rather than merely the absence of a showing against it. As Mr. Justice Roberts pointed out in *Schneider* v. *State,* 308 U. S. 147, 161, speaking of the rights of freedom of speech and press, certainly no more precious than the right to citizenship itself,

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulations directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

And, as Justice Roberts pointed out, the "delicate and difficult task" of appraising the substantiality of reasons advanced in support of this legislation necessarily falls upon this Court.

The presumption of validity which normally attaches to legislation tends to disappear, and often is reversed, where a statute infringes basic civil liberties. Especially in due process cases is there a need for an affirmative showing that a discriminatory classification is "reasonable" in the light of conditions existing prior to the legislation, which are sought to be corrected.

a. Legislative History

In order that we may get an insight into the conditions which existed prior to the enactment of Section 404(c), let us briefly consider its history, especially since the Government in its brief in opposition to the petition for writ of certiorari seems to rest its entire case for the reasonableness of Section 404(c) on its view of that legislative history. The Government interprets the legislative record as revealing an "urgent need" for this blatant restriction on citizenship rights (Br. 15).

The Nationality Act of 1940, of which Section 404(c) is a part, amended the Citizenship Act of 1907 (34 STAT. 1228). The 1907 Act had provided, *inter alia*, that absence by a naturalized citizen for five years in a country not of his origin gave rise to a "rebuttable presumption" that the residence for that period of time was voluntary, and thus might lead to expatriation. It made similar provi-

sions for naturalized citizens who returned to their countries of origin. In actuality, reluctance to implement what was even at that time considered a harsh provision resulted in lax enforcement and lenient judicial interpretation. The presumption never became final, no matter how lengthy or for whatever cause the naturalized citizen resided abroad, and at worst, as was recommended by Attorney General Wickersham, resulted merely in a loss of diplomatic protection. There was no loss of citizenship. 28 Op. Att'y. Gen. 504. See also *United States* v. *Gay,* 264 U. S. 353; *Nurge* v. *Miller,* 286 Fed. 982; *Camardo* v. *Tillinghast,* 29 F. (2d) 527.

As this Court pointed out in the *Gay* case, at 358, the presumption was "easy to preclude and easy to overcome," and it seems to have been the attitude of the lower federal courts, following on the *Gay* decision, that the presumption in the 1907 Act was little more than a minor procedural matter, really a rule of evidence.

But after a considerable period of time the State Department expressed increasing dissatisfaction over the 1907 Act, specifically with respect to naturalized citizens who returned to countries of their origin. Naturalized citizens living in third countries provided little or no concern. Accordingly, when the Nationality Act of 1940 was projected as a comprehensive nationality law to codify all other nationality laws, serious consideration was given to the overall problem of naturalized citizens residing abroad, with particular attention paid to citizens residing in their country of former nationality.

The problem of citizens residing abroad was studied for a full five years by a Cabinet Committee of advisers which was established to prepare a draft nationality code for submission to Congress. This committee consisted of the Secretary of State, the Attorney General and the Secretary of Labor, and was composed of experts equipped with all the relevant materials and information needed. *Hearings before Committee on Immigration and Naturali-*

zation on H. R. 6127, Superseded by H. R. 9980, 76th Cong., 1st Sess., p. 691 (1940).

In its reliance upon the investigations and recommendations of this Committee, the Government in its brief refers to the "serious consideration" given to the problem of the naturalized citizen residing abroad in a country not of his origin (Br. 19). Section 404 is represented by the Government as expressing "the culmination of a policy considered and developed over a period of many years" (Br. 14-15), and also as "the product of a long process of legislative experience and deliberation" (Br. 22).

But the Government quotations and analysis of the Cabinet Committee Report give a seriously misleading impression. For the product of the five year process of deliberation by the Cabinet Committee was really a *flat rejection* of the provision which is now Section 404(c).

The Cabinet Committee did conclude that Sections 404(a) and (b), with which we are not here concerned, should be enacted, but recommended that restrictive legislation be limited solely to citizens who returned to countries of their origin, and that the 1907 Act as applied to citizens residing in third countries be unchanged. *Hearings,* at 495.

These results are not referred to or even reflected in the Government's in other respects somewhat detailed historical examination into the history of Section 404(c).

If Section 404(c), as it now stands, was rejected by the Cabinet Committee which codified the law, how then did it become a part of the present law? Congressional action was apparently stimulated by the suggestions contained in a revealing colloquy between Representative Rees and Mr. Richard Flournoy of the Department of State, during the hearings on the bill. *Hearings* at 140-141. This discussion may well represent the very apogee of legislative nonchalance in dealing with rights this Court has deemed to be "precious".

After the question of naturalized citizens residing in countries of origin had been dealt with, Mr. Rees asked Mr.

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Flournoy, "Don't you cover the question of a man who has come over here and has gone back (*sic*) to any country and remained awhile?"[4]

Mr. Flournoy. That was considered by the committee of advisers when the code was prepared, and it was thought that that might be a little severe to have expatriation resulting from residence in a third country. Since then, I may say, within the past year, one of our officials, a former consul now stationed in the State Department, sent me a memorandum saying that he thought we ought to have put into this code some provision to cover these cases.

Mr. Rees: The law is wide open now?

Mr. Flournoy: Yes.

Mr. Rees. And says that he is presumed to have lost his citizenship.

Mr. Flournoy. Yes.

Mr. Rees. In other words, you have done away with the presumption only in cases where a man goes back to his own country.

Mr. Fournoy. Under this expatriation provision, you mean?

Mr. Rees. Yes.

Mr. Flournoy. It is a serious question, and I think the committee and the subcommittee ought to consider whether it would be desirable to put in a provision to cover each person who goes to a third country. The principal cases we have, I may say, are these Zionists. They are principally Russian and German Jews who were naturalized in this country and later went to Palestine. We have other cases, but I mean there are more of that particular body than in any other category. We have other cases, for instance some German in this country who has gone

[4] One wonders whether referring to a naturalized citizen going "back" to a country from which he did not come is in the nature of a Freudian slip?

maybe to South Africa or to one place and another, and perhaps it would be desirable to have in the code a provision for termination of nationality in those cases. I think the thing is worthy of consideration. Maybe some of the representatives of the other departments here would want to express views on this.

Mr. Rees. Could there be a serious objection on your part, of your department, to a section that would provide, we will say, that the naturalized citizen, having remained away from the United States in foreign countries for a period of 5 years, would lose his citizenship, subject, however, to safeguards similar to those that are provided in the sections we have just discussed?

Mr. Flournoy: I do not think our Department would be opposed to that at all. I think rather that the Department might favor it. • • •

From this legislative discussion it would seem that to intimate, as does the Government, that Section 404(c) is the product of a "long process of legislative experience and deliberation," verges on the Pickwickian, when in truth it is seemingly the product of a memorandum from a "former consul now stationed in the State Department" and of Mr. Richard Flournoy's personal predilections. Petitioner's assertion that Section 404(c) was "one of those last minute amendments" (Pet. 17), which the Government vigorously denies (Br. 22), seems to be borne out by this record at least.

Why did the Cabinet Committee reject Section 304(c)? The answer is relevant to the quest for reasonableness. Perhaps one way of answering the question is to refer to the reasons stated by the Cabinet Committee for urging the enactment of Sections 404(a) and (b). The Committee reported that, "The number of these cases (of naturalized citizens returning to their countries of origin) is very

large, and they are a constant source of irritation." Further, the Cabinet Committee stated, "naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling." *Hearings*, at 495.

The Cabinet Committee pointed out that the group of citizens affected by Section 404(c) is but a small minority of all naturalized citizens residing abroad. *Hearings*, at 495. Mr. Richard Flournoy estimated that they composed but nine-tenths of the entire group. *Id.* at 141. Furthermore, as the Cabinet Committee pointed out, their identification with the native population was not as likely to occur as in the cases of naturalized citizens residing in their countries of origin. Nor was there any showing whatsoever of international friction, of embarrassments or of disloyalty on the part of naturalized citizens now covered by Section 404(c), although there was an elaborate depiction of difficulties caused by citizens returning to countries of their origin.

It would seem that for such a classification as this is to be upheld as "reasonable," there would have to be not only a showing of need on this basis, but also a clear and unequivocal showing that naturalized American citizens, by the very nature of their naturalized status, their allegiances and their loyalties, actually cause more "embarrassments and difficulties" (Br. 15) than do native-born American citizens.

But there is no reason to believe this. No showing was made—nor do we believe one can be made—to the effect that the naturalized citizen causes more friction than the native-born citizen, and thus should be discriminated against.

This point, which we believe goes to the heart of the question, is dealt with in cavalier fashion in the Govern-

ment's brief. Although two pages are devoted to an irrelevant quotation from the legislative hearings which refers to the nationality problem in general and not specifically to the problems of naturalized citizens living in countries not of their origin, only two sentences are spared for comment on this.

The Government maintains that the suggestion that there is no evidence of this kind of need for Section 404(c) "does not square with the factual situation found by Congress" and concludes, "In any event, we believe that the evaluation of this evidence was for Congress" (Br. 24). But, as has been pointed out, there is no "factual situation" and no "evidence". Furthermore, there is also no reason to assume that there is "insufficient evidence of abuse by native born citizens" (Br. 25). Nor are "those determinations • • • confided exclusively to the discretion of Congress" (Br. 25) as is contended by the Government. Such a delicate question is for this Court to decide.

The findings of the Cabinet Committee do not reflect an "urgent need" for legislation; rather, the opposite is clearly indicated. If we are to read the record correctly, there is no such showing here of need as was made, for instance, in the *Hirabayashi* case. The Government claims the *Hirabayashi* case as a support for the discriminatory classification of Section 404(c). But in that case this Court demanded an extensive showing of need for the restrictive legislation before it reluctantly allowed it to stand. And this Court in *Hirabayashi* condoned the distinction created there between American citizens only on the basis that the gravest conceivable emergency, involving the very existence of our nation in time of war and of threatened invasion, existed.

Even here, in considering the Nationality Act of 1940, a showing of need was made by the Cabinet Committee for Sections 404(a) and (b). Included in the Report of

that Committee was an extensive discussion of the problem of naturalized citizens living in countries of their origin. Cited were thirteen typical case histories of citizens who had created problems. But no such showing of need was made for Section 404(c) by the Cabinet Committee and no further showing has been attempted by the Government, either that a need exists, or that the discrimination between the naturalized and native-born citizen is justified in fact.

3. The Possibility of Achieving the Same Benefits at a Lower Price

We come then to the demand that a classification be considered unreasonable if the "benefits" it seeks may be secured at a lower price. For one citizen to lose his citizenship is a high price. But, for us, the price is higher, for it is not the price of but one citizenship. The citizenship of many thousands of naturalized citizens who have made this country their own, many of whom find themselves living abroad without intent to expatriate themselves, is at stake. Beyond those few thousands whose immediate interests are involved, and whose citizenship is imminently threatened, are the interests of over six million naturalized citizens, all of whom are jeopardized by Section 404(c) and similar class legislation.

By its very terms, Section 404(c) strips citizens of their citizenship, whether or not they cause friction, embarrassment or trouble. Naturalized citizens whose residence abroad causes no concern to our State Department are just as much deprived of their prized citizenship as are those who may be creating some international problem. Citizens whose loyalty and allegiance to the United States have never been in question are subject to a penalty which is worse than a criminal penalty equally with the citizen whose loyalty to the United States might be

shown to have changed. Citizens who have desired to return to the United States, but who have been unable to do so because of lack of shipping facilities, adequate finances or for other reasons, also have their citizenship torn from them.[5]

Termination of citizenship in Section 404(c) is automatic; it allows for no consideration of intent to retain one's citizenship. More than this, although lip-service is paid to the doctrine of *Mackenzie* v. *Hare, supra,* and *Perkins* v. *Elg,* 307 U. S. 325 that expatriation must be a "voluntary act", no investigation is provided for determining whether an act of remaining abroad continuously for five years is voluntary or involuntary.

The automatic termination of citizenship, which works such a severe hardship, is another "last-minute" legislative accident. It was recommended by the Cabinet Committee for naturalized citizens residing in countries of origin, because "* * * proceedings in the courts would be cumbersome, long-drawn out, and expensive to the government * * *" due to the large numbers in this group. *Hearings,* at 493.

Even were that reason acceptable to this Court for denying due process of law to naturalized citizens living in countries of their origin, it certainly cannot be acceptable where the number of citizens involved in Section 404(c) is small and represents no administrative burden, and where the automatic termination was originally not designed for that group.

The concept that a citizen's precious citizenship can be snatched away from him in this manner reeks of the very essence of denial of due process. Unquestionably, it facilitates administrative proceedings to lay down a fiat that if a naturalized citizen remains abroad for five

[5] That many citizens have lost their citizenship by conditions outside of their control is indicated in a Report of the Special Committee on Expatriation of the National Council on Naturalization and Citizenship, entitled *Involuntary Loss of Citizenship,* March 1947, p. 16.

years for any cause, he loses his citizenship automatically, on the assumption that his absence proves conclusively that he either intended to relinquish it, that he voluntarily relinquished it, or that he should be deprived of it, because he causes trouble, or because he is "disloyal".[6]

The due process clause of the Fifth Amendment is instinct with the concept that no such fiat is permitted unless the relationship between the act relied on (here, the act of living abroad continuously for five years) and the permissible ground allows but one conclusion. See *Heiner* v. *Donnan*, 285 U. S. 312, 324; and *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 239-240 on the invalidity of conclusive presumptions. This Court only recently struck down a statutory presumption which in effect discriminated against a citizen "because of his father's country of origin." *Oyama* v. *California*, 332 U. S. 633, 647. How much more vicious than that rebuttable presumption is this irrebuttable, conclusive presumption!

By providing for automatic termination of citizenship in the face of injunctions of reasonableness of the Fifth Amendment and in light of the requirement that expatriation be a voluntary act embodying intent to divest oneself of citizenship, Congress has plunged into the realm of unconstitutionality.

This Court has repeatedly insisted that in cases where civil liberties are involved, Congress must direct its legislation at the precise evil it seeks to curb, and not legislate in too sweeping a manner. Where it is possible to confine remedial legislation to the specific evil, it seems clear that broadly repressive legislation is both unwise and unconstitutional.

If the Government wishes to expatriate American citizens who create international friction or trouble, as is

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[6] Although the Government does not contend that a concern for "loyalty" motivated enactment of Section 404(c), see the reference in the Government brief to the effect that "the proscriptions of Section 404 were aimed at conduct deemed inconsistent with fidelity to the United States" (Br. 23).

claimed, then legislation should be designed toward that end. Such legislation would provide orderly administrative proceedings for all citizens, whether naturalized or native-born. It would then be directed at the problem, not at the class. Similarly, if the question of loyalty arose, and if it were felt that citizenship might be taken away because of disloyalty as expressed in voluntarily living abroad, then appropriate steps might be taken with respect to the individuals involved and not be directed against an arbitrarily selected group, many members of whom may be wholly innocent of disloyalty.

As this Court has said in *Schneider* v. *State*, 308 U. S. 147, 162, in striking down a statute which forbade the distribution of pamphlets, the Constitution "does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is punishment of those who actually throw papers on the streets." And, in *DeJonge* v. *Oregon*, 299 U. S. 353, 364-5, this Court stated that while "The people through their legislatures may protect themselves against • • • abuse • • • the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." See also *Thomas* v. *Collins*, 323 U. S. 516, 532; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Carlson* v. *California*, 310 U. S. 106, 112; *Lovell* v. *Griffin*, 303 U. S. 444, 451.

The premise that proceedings to examine individually into the question of loyalty, of voluntariness, and of intent would be too "cumbersome, long drawn-out and expensive" was never articulated as a justification for the sweeping character of Section 404(c). Yet it seems to be an inarticulate premise in the Government's brief. There is no evidence in the record as to the validity of this proposition; there is evidence to the contrary.

There seems to be no reason, as a matter of fact, for changing the manner in which this problem was adminis-

tered in the 1907 Act. That act created a rebuttable presumption that there was a desire on the part of the citizen to voluntarily relinquish citizenship after five years unless some positive evidence to the contrary was adduced—usually to a consul in the foreign country in which the citizen was residing. The fact that the petitioner here registered for the draft, for instance, might have been considered evidence under that act of a desire to remain an American citizen and assume its responsibilities. See BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915) 552-553.

The purpose of the 1907 Act, as administered and as interpreted by the courts, was to provide against unnecessary international entanglements without needlessly jeopardizing citizenship rights. To this end, liberal exemptions were provided for, which are lacking in Section 404 (c) although Section 404(c) does embrace other obviously discriminatory provisions exempting from the effect of the act veterans of World War I and the Spanish American War, citizens born in Puerto Rico, and others. 8 U. S. C. 805, 806.

It might readily be acknowledged that citizens living abroad do create legitimate concern, and that they may give rise to questions as to continued allegiance and be creative of international frictions. Obviously, the problem cannot be overlooked, but while it must be dealt with in a manner which is reasonably protective of this nation, at the same time it should also be protective of the priceless rights which are threatened.

In our view, the 1907 Act fulfilled this function. However, an even more thorough examination into citizenship might be desirable. We submit that no less protection should be guaranteed the naturalized citizen than is provided in the denaturalization proceeding. For Section 404(c) deals with naturalized citizens whose citizenship has been sought and won in good faith. It would be a

legislative anomaly indeed were these citizens to be afforded less protection than those who it is claimed secured citizenship by fraud and deceit.[7]

This Court has repeatedly urged the most elaborate protection for citizens in denaturalization proceedings. In *Schneiderman* v. *United States,* 320 U. S. 118, it was said of the denaturalization proceeding that "proof to bring about a loss of citizenship must be clear and unequivocal." Justice Frankfurter pointed out that the case made out by the Government in *Baumgartner* v. *United States,* 322 U. S. 665, 670 lacked "that solidity of proof which leaves no troubling doubts in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen."

Finally, as Justice Rutledge declared in *Knauer* v. *United States,* 328 U. S. 654, 678, "If strings may be attached to citizenship and pulled retroactively to annul it, at the least this should be done only by those forms of proceeding most fully surrounded with the constitutional securities for trial which are among the prized incidents of citizenship."

This Court should demand no less for the citizens affected by Section 404(c) than for the citizen accused of fraud. There should be assurance of an examination on an individual, not class, basis of the elements which justify expatriation. And, as Justice Murphy has urged, where the "punishment of exile" is involved, all of "the safeguards of criminal procedure provided by the Bill of Rights" should precede the deprivation of "this most comprehensive and basic right of all." *Klapprott* v. *United States,* 335 U. S. 601, 616, 617.

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[7] If the Government does suggest that any of the naturalized citizens embraced by Section 404(c) secured their citizenship by fraud *ab initio* merely in order to have the cloak of American citizenship as a protection while living in some third country, then the denaturalization proceeding is the appropriate one. See Note, 52 YALE L. J. 1215 (1942); Black, *Disloyalty and Denaturalization,* 29 KY. L. J. 143 (1941).

Conclusion

Section 404(c) has been revealed as arbitrary and discriminatory legislation which strikes at the rights of millions of naturalized citizens. For that reason, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia be granted.

Respectfully submitted,

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